STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ANTONIO TATE,

Defendant-Appellant.

UNPUBLISHED
June 5, 2003

No. 231230
Wayne Circuit Court
LC No. 99-012340

Before: White, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty-five to forty years for the murder conviction and five to ten years for the assault conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We reverse.

Around 7:30 p.m. on Sunday, November 21, 1999, there was a drive-by shooting at 232 South Military Street in southwest Detroit, in which Toriano Collins (known as "T") was killed. Robert Madden, a friend of Collins', was standing outside the house with Collins at the time. A bullet struck Madden's coat zipper and knocked him down, but he was uninjured otherwise. Madden was the only eyewitness to testify at trial. The prosecution presented no physical evidence linking defendant, or the codefendant,[1] to the shooting. The weapon used was never recovered.

On the evening of the shooting, Madden told police that Collins sold drugs, that a drug deal had just gone down when the shooting occurred, that there were a lot of people around when the shooting occurred, and that the shots came from a green Ford Tempo and that it was the same green Ford Tempo he had seen at a drug house on South Dragoon Street. On the evening of the shooting, Madden told police that the shooter was an "unknown black male." He later changed

[1] Defendant Tate was tried with co-defendant Dale Harper, whose separate appeal (Docket No. 230717) was submitted with the instant appeal in this Court.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

from "unknown black male," to "Lucky." Madden and several others, including police officers, testified at trial that there were two or three "Luckys" in the area.

I

Defendant argues that he is entitled to a new trial on the basis of newly discovered evidence. Under the circumstances presented here, we agree.

"In a bench trial, it is the role of the trial judge sitting as the trier of fact to observe the witnesses and decide the weight and credibility to be given to their testimony." *People v Garcia*, 398 Mich 250, 262-263; 247 NW2d 547 (1976), overruled in part on other grounds, *People v D'Alessandro*, 165 Mich App 569; 419 NW2d 609 (1988). We review the trial court's ruling on a motion for new trial for abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

> In order to merit a new trial on the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence. [*Id.*, citing *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). See also MCR 2.116(A)(1)(f).]

Defendant supported his motion for new trial with several documents, including an affidavit of a prison inmate, obtained after trial. The inmate stated in his affidavit that he had worked as a doorman at a crack house at 1217 Dragoon Street. He stated that a guy he knew as "T" started to sell drugs on Military Street, and T began taking away business from the Dragoon house. The inmate described T as around 250 lbs., about 6'1" or 6'2", and as selling drugs out of a house next door to Viola's, with whom he (the inmate) was friends. The inmate's affidavit stated that he witnessed T shoot into the Dragoon house on November 20, 1999, that he so informed "Red," the drug dealer who ran the Dragoon house, and an associate of Red's named "Pooh," that Red and Pooh had him (the inmate) drive to where T was and point T out to them, which he did, and that the day after he had seen T shoot at the Dragoon house, he called Red and heard Pooh brag about killing T and "just missing" another man. The inmate's affidavit also stated that Viola told him that she saw two men get out of a blue van and shoot T, that Pooh drives a blue van and keeps an assault weapon in the back, and that he, the inmate, had personal knowledge that Pooh had used that van to commit other acts of assault and that he kept an assault rifle in the van. The affidavit described Pooh as about 26-27 years old, about 5'11" and about 270 lbs. The inmate described Pooh's van as medium blue, customized, with a round window on one side, tinted windows on both sides, and stated that he thought it was a 1986 or 1987 Chevy. The affidavit stated that "after Pooh shot T, he knew and bragged that he would not be arrested for doing it and continued to drive around in the blue van with the assault rifle in the back." It stated that "[a]fter T was shot, Pooh and Red moved their drug house from 1217 Dragoon to Fort and Dragoon, closer to T's old territory on the south side of the bridge." The affidavit stated "I know that Pooh was picked up and arrested by the 4th Precinct, before he shot T, in the same blue van that Viola saw him use the night that T was shot." It further stated that there had been a raid on 1217 Dragoon and that he heard two police officers, "Robocop" and Sanchez, say they suspected Red of being involved with T's murder. He stated that a lot of people thought "Lucky" (defendant Tate's nickname) had something to do with the house on Dragoon being shot up, but that he knew that T had done it. The affidavit stated that he knew Lucky, but did not

know Dale Harper (co-defendant to defendant Tate), but that he spoke to Harper in jail and said he would speak to Harper's lawyer. He met with Harper's lawyer on October 14, 2000. The inmate's affidavit ends by stating that he never talked to the police about T's murder because he feared retaliation, and the police never questioned him. The affidavit also stated that Pooh and Red were related, and that Pooh and Red had talked about coming from Texas originally.

The prosecution's response to defendant's motion for new trial argued:

> If believed, the evidence outlined would not be cumulative. It states that [the inmate] heard another person say he shot T, the victim. On its face, the affidavit and its contents appear to meet the test of not being discovered before trial: [the inmate] may have been incarcerated and was not a witness in the case. Only after he apparently talked with the codefendant did [the inmate] volunteer the new "evidence." (Note that plaintiff does not agree the presented affidavit contains the truth, only that a prima facie analysis of its contents fit generally within the test for newly discovered evidence.)
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> As to the point about reasonable diligence, plaintiff is not convinced that some of the facts set forth in [the inmate's] affidavit could not have been discovered pre-trial. All parties knew about the Dragoon house shooting, that police reports existed thereon, and that those reports would have contained names of persons associated with that incident. Merely because a trial stipulation to not go into the details of the Dragoon matter was entered[2] does not absolve counsel from investigating for possible exculpatory evidence, which the Dragoon report may have contained if what [the inmate] states is even partially true.
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> Lastly, plaintiff is not convinced that had this evidence been presented to the court as factfinder, the result most likely would have been different. Such a conclusion involves projecting which witnesses would have testified about what, and the

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[2] The trial court's March 29, 2000 order stated in pertinent part:

> 4. The prosecution has informed the defense that the People do not intend to use evidence of a shooting/firebombing that occurred at 1217 Dragoon Street, Detroit, nor do the People intend to introduce evidence of the alleged drug-dealing activity of either defendant. By stipulation, it is ordered that this evidence shall not be heard by either of the juries.

The case was actually tried by the court. Defendant Tate's motion for new trial explained why the parties stipulated not to refer to the Dragoon house shooting as follows:

> Two days before the victim (T, or Collins) in our case was killed, he was rumored to have shot at his rival at a drug house on 1217 Dragoon Street. The defendant had no connection to the house on Dragoon so to avoid confusion and to keep evidence of the defendant's own drug affiliations from the trier of fact, counsel stipulated to not elicit that evidence.

> extent of impeachment carried out on those witnesses (given their questionable backgrounds and obvious maneuverings for more favorable treatment).
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> * * *
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> Therefore, although the first impression of the affidavit of [the inmate] is one of newly discovered evidence, there is nothing convincing about the content of the evidence as given that should lead this court, which sat as factfinder, to doubt its verdict of guilt as to defendant. Nothing requires the court to hold a hearing on this claim, but plaintiff would prefer to be given further time to explore all the facts given by [the inmate] in lieu of a ruling that an evidentiary hearing should be held. (The inmate gives names and dates which can be investigated without expending time and funds to bring him back and stage a hearing.)

The trial court denied defendant's motion for new trial, concluding that the newly discovered evidence would not have led to a different result.

Defendant's motion for new trial had addressed the issue of diligence, sufficiently, in our opinion, to counteract the prosecution's response. Defendant's motion argued that "counsel had no information before trial regarding [the prison inmate] or of what he knows," that "of the witnesses with whom the police spoke about the shooting at Dragoon, none identified the victim as the shooter and none informed the police that the real shooters had admitted killing the victim," and that "[t]he police did not have any information about [the inmate] and he had refused to come forward with his testimony until recently." Defendant's motion also argued that "we now have a disinterested witness who will testify that someone else had a real motive for killing the victim and that same person admitted to doing the shooting. He can identify the real killer."

We are satisfied that defendant made a showing that the identity of the inmate, his involvement in the Dragoon house and alleged witnessing of Collins' shooting at the Dragoon house and his knowledge that Collins was retaliated against, was not discoverable and producible at trial with reasonable diligence.

On appeal, the prosecution argues that the inmate's affidavit constituted uncorroborated hearsay and that the evidence would not have led to a different result:

> Although the newly discovered evidence presented by defendant is not cumulative on its face, and apparently was not known at time of trial, there has been an insufficient showing by defendant that the result of the trial most likely would have been different with the evidence. The affidavit is hearsay and refers to a third person. There is no corroboration of any of the evidence offered.

The prosecution cites in support of its argument regarding hearsay *People v Miller*, 141 Mich App 637; 367 NW2d 892 (1985). In *Miller*, the defendant supported his motion for a new trial with a letter from a state prison inmate stating that a person other than the defendant, a Timothy Mann, confessed to killing the decedent and that the defendant was not involved. The trial court concluded that the inmate's letter was hearsay and that the newly discovered evidence probably would not cause a different result on retrial. This Court affirmed, noting:

> Defendant claims that the statement is not hearsay, relying on the declaration against interest exception to the hearsay rule. MRE 804(b)(3). Defendant, however, failed to establish Timothy Mann's unavailability under MRE 804(a)(1). Also, while the statement is obviously against Mr. Mann's interest, defendant has failed to show any corroborating circumstances that clearly indicate the trustworthiness of the statement. MRE 804(b)(3); *United States v Satterfield*, 572 F2d 687 (CA 9, 1978), *cert den* 439 US 840; 99 S Ct 128; 58 L Ed 2d 138 (1978). Not only is there a lack of corroborating evidence, **Mr. Mann's statement directly conflicts with defendant's defense which denied any involvement in the crime. Mr. Mann's statement clearly implicates defendant as being involved in at least an attempted larceny. The evidence therefore weakened defendant's case and a different result on retrial would be highly unlikely.** The lower court properly denied the motion for a new trial. [*Miller, supra* at 642-643. Emphasis added.]

Miller is distinguishable. In the instant case, the inmate's affidavit states that he witnessed Collins shoot at the Dragoon house, and that he identified Collins to Pooh and Red. Although the statements in the affidavit attributed to Pooh may be hearsay, they *support* defendant's defense of innocence. The affidavit provides a motive for Collins' murder, and sheds light on the timing of the drive-by shooting, both of which aspects were absent from the prosecution's case at defendant's trial. The inmate's physical description of T coincides closely with the medical examiner's trial testimony that T was 6' and weighed approximately 278 lbs. at the time of his death. Further, the inmate properly stated that the house at which T was killed was next to Viola Akins' house, as Akins herself testified at trial. In addition, that the shots came from a van, rather than a small car, is supported by the physical evidence.

We recognize that this was a bench trial. We have the assessment of the trial court, which sat as factfinder, and accord it great deference. However, the trial court's determination that the newly discovered evidence would probably not have altered the outcome of the trial is not conclusive. *People v Shepard*, 465 Mich 921; 636 NW2d 514 (2001), reversing the judgments of this Court and the trial court, following a bench trial, that the defendant was not denied effective assistance of counsel. See *People v Shepard*, unpublished opinion per curiam of the Court of Appeals (Docket No. 185242, issued 9/7/99).

The trial testimony of the prosecution's sole eyewitness, Robert Madden, was full of contradictions and his ability to perceive the shooter deeply questionable, at best. On the key point of the type of car involved in the drive-by, Madden's trial testimony differed from previous testimony and statements he had given. Madden, who had been an auto mechanic for twenty-nine years, gave a statement to the police on the evening of the drive-by shooting, in which he said the shooter was in a green Ford Tempo. He also told the police that the green Ford Tempo involved in the drive-by was the same Tempo he had seen at a drug house on South Dragoon Street. At the preliminary examination, he testified that the car was a 1986 to 1988 green Ford Tempo, and that he was certain it was a Ford, noting that he had been an auto mechanic for thirty years. At trial, however, Madden testified for the first time that the car was a Chevy Geo. Further, Madden testified that he had known "Lucky" for several years, though he did not know Lucky's real name, however, he did not identify defendant as the shooter to the police with whom he initially talked. The police that interviewed Madden initially testified that Madden

described the shooter as an *unknown* black male, 18 to 25, thin build, dark complected, armed with an unknown type rifle and in a two-door green Ford Tempo. Madden and several other witnesses, including police, testified that there were two or three "Luckys" in the neighborhood. Further, the physical evidence supported that Collins' shooting could not have occurred as Madden testified at trial. Madden testified at trial that Collins was sitting on the next to the top porch step and stood up as the car slowed by the house, and that when shot he fell back onto the porch, and was shot in the back. The medical examiner testified that the two bullets entered the front of Collins' body (his cheek and chest) at a slightly downward angle, and that they could not have come from a regular size car on the street if the shooting occurred as Madden testified it occurred, i.e., with T standing on the next to the last porch step of the 232 South Military house and the vehicle approximately thirty feet away in the street. The medical examiner testified that the shots could have come from a vehicle that sat higher above the ground, like an SUV.

Madden's ability to perceive and identify the shooter was questionable, given that the shooting happened during the darkness of night, there was no electricity in the 232 South Military house, which was vacant at the time, and there was only one street light, across the street from the house, the shooter was purportedly wearing a dark hooded jacket with the hood up and was African-American, the lights of the car the shooter was in were off, the shooting (with a semi-automatic weapon) took a matter of seconds, and Madden testified that the only time he saw the shooter's face was from under a bush, to which he testified he crawled after the shooting started and after a bullet struck his jacket and knocked him down. Further, during a taped interview of Madden by defense counsel, which was admitted and excerpts of which were played at trial, Madden repeatedly stated to defense counsel that defendant Tate was not the shooter and that he, Madden, was put up to stating that he was by the police and police harassment.

We conclude that the trial court abused its discretion when it denied defendant's motion for a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

In light of our disposition, we do not address defendant's remaining arguments. However, we note that it appears that defense counsel's access to discovery and to witnesses was unduly restricted by the prosecution and officer in charge of the case.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs